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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,

Petitioners,

—v.—

ARLO TATUM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO WITHDRAW OPINION OF THE COURT AND MOTION TO RECUSE MR. JUSTICE REHNQUIST *NUNC PRO TUNC*

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MOTION TO WITHDRAW OPINION OF THE COURT

Respondents respectfully move this Court for an order withdrawing its opinion in *Laird* v. *Tatum,* No. 71-288, filed on June 26, 1972. Such an order will facilitate the consideration by Mr. Justice Rehnquist of the attached motion to recuse him *nunc pro tunc* from participating in the Court's deliberation and decision in this case. If Mr. Justice Rehnquist does recuse himself, respondents suggest it would then be appropriate for the Court to vote again on the case and take whatever subsequent measures are dictated by the result of the new vote. If Mr. Justice Rehnquist does not recuse himself, the opinion can be reinstated, subject, of course, to whatever disposition the Court may make of respondents' Petition for Rehearing on the merits of the case, which has been separately filed.

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MOTION TO RECUSE MR. JUSTICE REHNQUIST *NUNC PRO TUNC*

To the Honorable William Rehnquist, Associate Justice of the United States:

Respondents respectfully move that Mr. Justice Rehnquist recuse himself *nunc pro tunc* from participating in the Court's deliberation and decision in *Laird* v. *Tatum*, No. 71-288, decided June 26, 1972.

The principal ground for this motion is the federal statute governing the disqualification of justices and judges, 28 United States Code, section 455, which reads in pertinent part as follows:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, [or] is or has been a material witness. . . .

A further ground for the motion is the Final Draft of the Code of Judicial Conduct (May 1972) prepared by the Special Committee on Standards of Judicial Conduct of the American Bar Association, which reflects in detail the considerations underlying the disqualification statute, and provides as follows in Canons 2-A and 3-C(1)(a) and (b):

> Canon 2. *A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.*
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> Canon 3. *A Judge Should Perform the Duties of His Office Impartially and Diligently.*
>
> . . . . . .
>
> C. Disqualification.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

The question presented to the Supreme Court in *Laird* v. *Tatum* was "[w]hether the Court of Appeals was correct in holding that respondents' claim—that unauthorized and extensive surveillance by the United States Army of constitutionally protected civilian political activity is an unconstitutional burden on [respondents'] exercise of their First Amendment rights—was justiciable under Article III" [Brief for Respondents, at 1]. In an opinion by the Chief Justice, and by vote of 5-4, the Court held that "allegations of a subjective 'chill' are not a substitute for a claim of specific present objective harm or a threat of specific future harm" [Slip Op., at 12-13]. Mr. Justice Rehnquist voted with the majority and joined in its opinion.

I.

Prior to his nomination and confirmation as an Associate Justice of the Supreme Court, Mr. Justice Rehnquist served as an Assistant Attorney General in the Office of Legal Counsel. During his tenure in that office he was called upon or chose to act as "a Justice Department spokesman"[1] on the question of the constitutionality of governmental surveillance in particular factual settings. In such capacity,

[1] Testimony of William H. Rehnquist, Hearings before the Committee on the Judiciary, United States Senate, 92nd Cong., 1st Sess., on Nominations of William H. Rehnquist and Lewis F. Powell, Jr. to be Associate Justices of the Supreme Court of the United States [hereafter "Confirmation Hearings"], at 185.

Assistant Attorney General Rehnquist appeared twice as a witness in hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary[2] to testify about the surveillance practices of the United States Army, and other agencies of government.

Repeatedly during his testimony in the Senate hearings on March 9 and March 17, 1971, Assistant Attorney General Rehnquist stated in response to questions from members of the subcommittee that he did not agree that "there are any serious constitutional problems with respect to collecting data on or keeping under surveillance persons who are merely exercising their rights of peaceful assembly or petition to redress a grievance."[3] The witness' testimony was by no means confined to such general statements; the concrete factual setting which he chose to discuss was the surveillance of civilians by the United States Army as depicted in the pleadings and the District Court decision in *Tatum* v. *Laird*, the very lawsuit brought by the respondents herein. Not only did the witness display a special and intimate knowledge of facts concerning the case based upon his possession of documentary evidence which has never been made available to the respondents,[4] but he also tes-

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[2] *Federal Data Banks, Computers, and the Bill of Rights*, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 92nd Cong., 1st Sess., March 9 and 17, 1971 [hereafter, "Ervin Hearings"].

[3] Ervin Hearings, Vol. 2, at 620. See also *Id.*, at 601-04, 617-22, 861-67.

[4] The core of the evidence offered for proof by the plaintiffs was a section of a computer printout of Army intelligence information describing the constitutionally protected political activities of the plaintiffs and others similarly situated, appended to the Complaint as Exhibit A (Appendix, at 14-17).

In his testimony and in correspondence with the chairman of the subcommittee, the witness indicated that following the institution

tified in considerable detail, in response to a question by Senator Ervin, why in his view the case was not justiciable:

> Senator Ervin. But you do take the position that the Army or the Justice Department can go out and place under surveillance people who are exercising their first amendment rights even though such action will tend to discourage people in the exercise of those rights?
>
> Mr. Rehnquist. Well, to say that I say they can do it sounds either like I am advocating they do it or that Congress has authorized it, none of which propositions do I agree with.
>
> My point of disagreement with you is to say whether as in the case of *Tatum* v. *Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.[5]

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of this lawsuit, all but one copy of the entire printout alleged as the evidentiary basis for the suit were destroyed, and the one remaining copy was placed in the physical custody of the witness. Ervin Hearings, vol. I, at 601-602, 622; vol. II, at 1369-70. See also Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 92nd Cong., 1st Session on S.1125, at 407 (letter to Senator Ervin from J. Fred Buzhardt, General Counsel, Department of Defense, March 19, 1971).

The witness did not confine his comments on the evidence to his role as custodian of the printout. Apparently in response to allegations made by the plaintiffs and others that the Army's intelligence data on civilians had been disseminated to other agencies of government, the witness testified that "[n]o information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base." Ervin Hearings, vol. I, at 601.

[5] *Id.*, vol. I, at 864-65.

Nor did Assistant Attorney General Rehnquist confine his comments on Army surveillance and the justiciability of *Laird* v. *Tatum* to his oral testimony before the Ervin Subcommittee. He also appeared in other public forums to express his views about these subjects. On March 19, 1971, for example, he delivered a speech to the National Conference of Law Reviews in Williamsburg, Virginia, in which he stated that "no legitimate interest of any segment of our population would be served by permitting individuals or groups of individuals to prevent by judicial action, the government's gathering of information. . . . I have previously stated my belief that the First Amendment does not prohibit even foolish and unauthorized information gathering by the government."[6] The Assistant Attorney General made similar comments on the justiciability of court challenges to governmental surveillance at meetings of the Maricopa County, Arizona Bar Association on March 15, 1971,[7] and the American Bar Association on July 15, 1971.[8]

Finally, on September 20, 1971, Assistant Attorney General Rehnquist submitted to the Ervin Subcommittee a memorandum of law in response to a request by Senator Hruska for an interpretation of Supreme Court cases cited by a previous witness to support the proposition that Army

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[6] "Privacy, Surveillance, and the Law," speech reprinted in Ervin Hearings, vol. II, at 1593, 1595.

[7] "Curbs on Investigators Called Serious Mistake," *Arizona Republic*, March 16, 1971.

[8] "Law Enforcement and Privacy," remarks of William H. Rehnquist, Assistant Attorney General, office of Legal Counsel, at the American Bar Association Convention, Sonesta Tower Hotel, London, England, July 15, 1971, at pp. 12-13.

surveillance activities are unconstitutional.[9] The Rehnquist memorandum not only presented the argument that Army surveillance was not unconstitutional under any case decided by the Supreme Court, but also offered the following comment on the allegations made by the respondents herein:

> Recent experience seems to establish that, even if the strongest allegations concerning Army data-gathering are assumed to be true, there has been no interruption in 'uninhibited, robust, and wide open' debate on major controversial issues. (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Both the Veterans' demonstration and the later May Day demonstration seem to substantiate that. If anything, the now-terminated data-gathering functions of the Army seem to have stimulated rather than curtailed debate. . . . Indeed, it may be that repeated assertions of such government information gathering activity do more to inculcate paranoia in the general populace than the actual gathering of information itself.[10]

In the Senate hearings on his nomination as an Associate Justice of the Supreme Court, Assistant Attorney General Rehnquist was questioned on several occasions about his prior public statements and testimony concerning Army surveillance. In each instance the nominee responded either by reaffirming his view that such surveillance is not

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[9] The previous witness was Alexander Polikoff, attorney for the plaintiffs in *ACLU* v. *Westmoreland*, 70 Civ. 3191 (N.D. Ill. 1970), affirmed sub nom. *ACLU* v. *Laird*, 71-1159 (7th Cir. May 23, 1972), a case involving a challenge to Army surveillance practices similar to the case at bar. Mr. Polikoff's testimony presented the legal argument made in both cases. Ervin Hearings, vol. I, at 91-100.

[10] Ervin Hearings, vol. II, at 1408-09.

unconstitutional,[11] or by indicating that it would be improper for him to comment on issues in which he had been involved as Assistant Attorney General because of his "lawyer-client relationship" with the President and the Attorney General.[12] At the time of these confirmation hearings the Petition for Certiorari in *Laird* v. *Tatum* was pending in the Supreme Court.[13]

II.

Respondents do not, of course, question Mr. Justice Rehnquist's good faith in expressing his views on the constitutional issues presented by this case prior to his nomination and in adhering to those views in the Senate confirmation hearings. Indeed, it was precisely because of the clarity and finality of his testimonial views and the intimacy of his knowledge of the evidentiary facts at issue in this case that the respondents were convinced that Mr. Justice Rehnquist would not participate in the Court's deliberation and decision, and thus are now constrained to move to disqualify him *nunc pro tunc* for participating improperly. This motion is not made lightly, but only after careful consideration by counsel and their colleagues in full knowledge of its unprecedented nature.[14]

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[11] Confirmation Hearings, at 66-67, 185-86, 489. Although the nominee indicated that he "was speaking for the Department [of Justice]" in his statement before the Ervin Subcommittee, he would "stand by that statement" in the Confirmation hearings. *Id.* at 66.

[12] Confirmation Hearings, at 34, 48-49, 171-76.

[13] Petition for Certiorari filed on August 25, 1971.

[14] In *Jewell Ridge Coal Corporation* v. *Local No. 6167, United Mine Workers of America*, 325 U.S. 897 (1945), the only other reported instance where the issue of disqualification was raised by a party in a Supreme Court case, a petition for rehearing on the

The disqualification provisions of 18 U.S.C., section 455 are mandatory upon a justice or judge who has "a substantial interest," has "been of counsel" or "has been a material witness" in connection with any proceeding before him. Indeed, the statute is bottomed on a fundamental principle of procedural due process frequently applied by this Court: "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison,* 349 U.S. 131, 136 (1954). The stringency of this rule "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 99 L. Ed. 11, 75 S.Ct. 11." *Id.,* at 136. See also *Commonwealth Coatings Corporation* v. *Continental Casualty Company,* 393 U.S. 145, 148 (1968) ("any tribunal permitted by law to try cases or controversies not only must be unbiased, but also must avoid the appearance of bias"); cf. *Tumey* v. *Ohio,* 273 U.S. 510 (1927).

The mandatory provisions of the disqualification statute have been frequently recognized by lower federal courts under circumstances similar to those of Mr. Justice Rehnquist in the case at bar. In *Roberson* v. *United States,* 249 F.2d 737, 741 (5th Cir. 1957), *cert. denied,* 356 U.S. 919 (1958) the statute was construed to require disqualification if a judge has "a prior knowledge of the facts or prior interest in an issue arising out of them." Similarly, in *United*

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ground that a justice had improperly participated was denied because "the complaint is one which cannot properly be addressed to the Court as a whole. . . ." (Jackson, J., concurring). This decision was reached three years before the enactment of the disqualification statute upon which the instant motion is based.

States v. *Vasilick,* 160 F.2d 631, 632 (3rd Cir. 1947), it was held that a district judge who was a district attorney when a criminal defendant was tried and convicted in his jurisdiction should have disqualified himself from a motion to vacate the sentence. The Court of Appeals pointed out that "[i]n reaching this conclusion we desire to make it abundantly clear that we entertain no doubt of the fairness or impartiality of the District Judge." *Id.* at 632. See also *United States* v. *Maher,* 88 F.Supp. 1007 (D. Maine 1950) (former United States Attorney must disqualify himself as judge in any case arising during his tenure as United States Attorney). Furthermore, the "interest" contemplated by the statute has, in the case of former government attorneys, been construed to mean "the interest that any lawyer has in pushing his case to a successful conclusion." *United States* v. *Adams;* 302 F.2d 307, 310 (5th Cir. 1962).

The reason for such stringent application of the disqualification statute in the case of judges who have been publicly associated prior to their judicial appointment with one side of a case pending before them was stated by the Sixth Circuit Court of Appeals in *United States* v. *Amerine,* 411 F.2d 1130, 1133 (6th Cir. 1969):

> We believe that the language employed by Congress [in 18 U.S.C. Section 455] compels the conclusion that Congress was concerned with avoiding the *appearance* of partiality as well as avoiding the fact. See *Rapp* v. *Van Dusen,* 850 F.2d 806 (3rd Cir. 1965); *Texaco, Inc.* v. *Chandler,* 354 F.2d 655 (10th Cir. 1965). See also *American Cyanamid Co.* v. *FTL,* 363 F.2d 757, 763-68 (6th Cir. 1966) [emphasis in original].

This interpretation of the statute is also reflected in a memorandum, "Disqualification of Supreme Court Justices because of a prior participation in a case as a Government

attorney or official," prepared for Mr. Justice White by the Office of Legal Counsel at the time of his nomination as an Associate Justice.[15] Citing *Roberson, supra,* the memorandum at pp. 2-3 pointed out that prior knowledge of the facts in a case or a prior interest in an issue arising out of them are grounds for statutory disqualification of a sitting justice. Under circumstances where a former Justice Department official has had more than "a mere pro forma relationship" with a case, therefore, disqualification would be required.[16]

Former government lawyers and officials are similarly entreated by the Commentary to Canon 3C(1)(a) and (b), *supra,* of the 1972 Draft Code of Judicial Conduct: "a judge formerly employed by a governmental agency . . . should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." Under the circumstances of the instant case, Mr. Justice Rehnquist's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allega-

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[15] The memorandum is on file with the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee. At p. 49 of the Confirmation Hearings Mr. Justice Rehnquist testified that he would consider himself to be bound by the standards enunciated in the memorandum if his nomination were confirmed.

[16] Justice Department memorandum, at 4-5. The memorandum cites two notable examples in Justice Jackson's disqualification in *Schneiderman* v. *United States,* 320 U.S. 118, 207 (1942), a case instituted during his tenure as Attorney General, and Chief Justice Stone's disqualification "in the *Aluminum Company* case because it seemed to him that his connection with it as Attorney General was 'so intimate' for a time that it was 'distinctly undesirable' that he should assume to sit in it." *Id.* at 5. See also Frank, *Disqualification of Judges,* 56 Yale L.J. 605 (1947).

tions, and because of his public statements about the lack of merit in respondents' claims.[17] For these reasons Mr. Justice Rehnquist has displayed an interest and involvement in the case sufficient to warrant his disqualification *nunc pro tunc* from the deliberation and decision of the Court.

Respectfully submitted,

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[17] "Justice Douglas, in his view of the requirements of 28 U.S.C. 455, according to his counsel has disqualified himself in the following cases:

* * * * *

(2) In cases involving parties or matters about which he has publicly spoken so as to place his impartialty in doubt. See, e.g., *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955); *County of Santa Barbara* v. *Molley*, 396 U.S. 950 (1969)." Final Report by the Special Subcommittee on H. Res. 920 of the Committee on the Judiciary, House of Representatives, 91st Cong., 2nd Sess., at 42-43.